

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RENEE ARMSTRONG)	
Claimant)	
VS.)	
)	Docket No. 192,037
NORTH AMERICAN PHILIPS LIGHTING)	
Respondent)	
AND)	
)	
TRAVELERS INSURANCE COMPANY)	
Insurance Carrier)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

Both claimant and respondent appealed the Award Upon Remand dated April 29, 1997, entered by Assistant Director Brad E. Avery. The Appeals Board heard oral argument on October 29, 1997.

APPEARANCES

Robert A. Martin of Salina, Kansas, appeared for the claimant. John W. Mize of Salina, Kansas, appeared for the respondent and its insurance carrier. David G. Shriver of McPherson, Kansas, appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award Upon Remand.

ISSUES

The Assistant Director found that claimant failed to prove she sustained a work-related accident on November 20, 1992, and denied her benefits for that claim. The Assistant Director, however, found that claimant sustained a work-related accident on

February 4, 1993, and awarded her benefits for a 3 percent whole body functional impairment. The issues raised for Appeals Board review are:

- (1) Did claimant sustain personal injury by accident arising out of and in the course of her employment with respondent on either November 20, 1992, or February 4, 1993? The respondent contends claimant failed to prove that she was injured at work on either of the alleged dates.
- (2) What is the nature and extent of claimant's injury and disability? Claimant contends she has established a significant permanent partial general disability under K.S.A. 1992 Supp. 44-510e.
- (3) Did claimant provide respondent with timely notice of accident and timely written claim? Respondent contends that K.S.A. 44-520 is procedural and, therefore, claimant was required to notify it of the accidental injury within ten days of its occurrence as required by the 1993 legislative amendments. Further, respondent contends claimant failed to prove any notice of an accidental injury and that the written claim served upon it was not timely as it was served beyond 200 days after the date of the alleged accidents. The respondent also argues that it was prejudiced due to the lack of notice.
- (4) Is respondent entitled to a credit under K.S.A. 44-510a? If claimant sustained the two accidents as alleged, respondent contends it is entitled to a K.S.A. 44-510a (Ensley) credit.
- (5) What is the liability of the Workers Compensation Fund? The respondent contends it retained claimant in its employ despite having knowledge that she had significant back problems. The respondent argues that the alleged injuries would not have occurred but for the preexisting condition and, therefore, the Fund is responsible for the entire award. The Workers Compensation Fund, on the other hand, argues that claimant was not a handicapped worker before the alleged accidents and respondent lacked the information to reasonably reach that conclusion.
- (6) Is the claimant entitled to an award for payment of medical expense?

At oral argument before the Appeals Board, the Workers Compensation Fund abandoned its argument that claimant was not disabled from work for the prerequisite period set forth in K.S.A. 1992 Supp. 44-501(c).

FINDINGS OF FACT

After considering the entire record, the Appeals Board finds as follows:

- (1) The claimant, Renee Armstrong, began working for North American Philips Lighting through a temporary employment agency in October 1988. Three months later, Philips hired her to be a purchasing clerk. In 1991, Philips promoted Ms. Armstrong to warehouse supervisor. Until May 1992, Ms. Armstrong's job duties were entirely clerical. But after that date, she was also required to assist the loading dock workers, which required her to lift and handle boxes of lamps.
- (2) At approximately 6 p.m. on Friday, November 20, 1992, Ms. Armstrong felt a shooting sensation and a sharp twinge in her back while moving boxes of lamps to check product numbers. After the initial symptoms subsided, Ms. Armstrong felt a dull ache in her back. When she awoke the next morning she could hardly move. That morning she also experienced pain radiating into her buttocks and legs.
- (3) Because her symptoms were not improving, on Sunday, November 22, 1992, Ms. Armstrong sought treatment at the Asbury Regional Medical Center emergency room. At that time, Ms. Armstrong advised the emergency room physician she injured her back at work on Friday while moving boxes. She was prescribed medications and three days' bed rest and instructed to follow up with her family physician, Larry E. Burnett, D.O., whom she saw on November 25, 1992.
- (4) Ms. Armstrong testified that when she saw Dr. Burnett she told him she had felt a snapping and pulling sensation in her back before she left work on the preceding Friday and then could not move when she awoke the next day. The doctor advised her to continue her medications and lie down as needed. The doctor also released her to return to work on November 30, 1992.
- (5) On November 30, 1992, Ms. Armstrong notified Philips of her back injury. At that time Philips questioned her absence from work and even contacted the hospital. Later, Philips required Ms. Armstrong to obtain a copy of her hospital records and provide them to the company nurse.
- (6) From November 30, 1992, until February 4, 1993, Philips increased the time Ms. Armstrong was required to work on the docks. During that time Ms. Armstrong continued to take her medications. Her back pain was noticeable but not severe.

(7) On February 4, 1993, while sitting and doing paperwork, Ms. Armstrong swung in her chair and felt another snapping sensation in her back. She called Dr. Burnett's office to obtain a prescription for pain medication. Linda Waggle, one of Ms. Armstrong's supervisors, was present when the incident occurred. Immediately after the incident, Ms. Armstrong told Ms. Waggle that she had hurt her back and was going to call a doctor. After this incident, Ms. Armstrong's dock work was reduced and she performed mostly clerical duties.

(8) Following the incidents at work, Ms. Armstrong told her supervisor she was having problems with her back to no avail. At pages 40 and 41 of the regular hearing, the following appears:

Q. Do you know why there was a change from the dock duties to more clerical, or do you know that?

A. I wasn't told, and when I questioned her about this change in duties and told her I was having problems with my back and my physical capabilities, I was told, quote, I don't care, that is your job and you need to do it, unquote.

Q. Who told you that?

A. Linda Waggle.

Q. Do you believe that if you would have remained employed there after March of '93 that you could have performed the physical aspects of the dock work?

A. No.

Q. Why not?

A. The lifting was too much. A four foot fluorescent box that weighs 20 to 26 pounds is a very awkward object to move. The eight foot products were even more awkward, and that was a constant requirement to check these products, repack these products or help the employees as needed. There is no way I could have worked in that situation, in my opinion.

(9) Ms. Armstrong continued to work for Philips until March 5, 1993, when she was terminated for allegedly falsifying an absent worker's time card. Ms. Armstrong disputed those allegations and filed suit against Philips, which ended in settlement with provisions that it be kept confidential. And she continues to dispute those allegations of wrongdoing. Even if she had not been terminated, Ms. Armstrong does not believe she could have continued

to perform the dock work because it required her to oftentimes lift and handle 4-foot and 8-foot long boxes, which were awkward to handle and weighed 20 to 26 pounds.

(10) After the February 4, 1993, incident, Ms. Armstrong experienced low back pain that would last for one or two weeks at a time. She called Dr. Burnett on a regular basis to obtain medication.

(11) Ms. Armstrong has a significant history of back problems. Starting with an automobile accident in the early 1980s, before the November 1992 incident at work, Ms. Armstrong had at least eight separate episodes where she experienced severe back pain and sought treatment. In June 1984, she hurt her low back when she lifted a child. In March 1986, she again experienced back pain due to moving furniture. In September 1988, she strained her low back lifting a baby out of bed. In May 1990, she again experienced severe low back pain when she had lain down on a couch and rolled over wrong. In April 1991, Ms. Armstrong again experienced a low back strain after bending over a bathtub to turn the water on. After that episode, the doctor gave her back exercises to perform daily. In June 1991, she strained her low back again while cleaning an oven. She once again strained her back in July 1992. After recovering from that episode, Ms. Armstrong began to self-limit her activities to protect her back.

(12) Despite that history of ongoing problems, Ms. Armstrong believes her back is worse now because of the November 1992 incident. Before, her back sprain or strain would quickly resolve and she would return to her normal activities. Now, however, she believes her back pain is more frequent, her symptoms take longer to resolve, and she is limited in performing her normal daily activities.

(13) Philips had knowledge that Ms. Armstrong had a low back condition that impaired her ability to work. In March 1989, Philips filed with the State Division of Workers Compensation a document entitled Notice of Handicap, Disability or Physical Impairment. That document indicated Ms. Armstrong was impaired due to her back. The company was also aware of Ms. Armstrong's ongoing back problems as she missed work after both the May 1990 and April 1991 back strains. Ms. Armstrong also testified that her supervisor observed her crying at work in July 1992 when her back pain was so severe she could hardly walk.

(14) The first job Ms. Armstrong obtained after leaving Philips was a carry out position with a Dillon food store. After three or four weeks she could not physically continue to perform that job and she quit. In late August 1993, Ms. Armstrong began working for a temporary employment agency and in either September or October 1993 was assigned to PKM Steel Service where she obtained a permanent position working in its offices as a receptionist and performing clerical work. When she testified at the regular hearing in March 1995, Ms. Armstrong was earning \$8 per hour.

(15) Ms. Armstrong has a 10 percent whole body functional impairment as a result of the November 1992 injury to her low back. That rating is the approximate average of the

3 percent impairment rating provided by board-certified orthopedic surgeon Jeryl G. Fullen, M.D., and the 16 percent rating provided by P. Brent Koprivica, M.D., who is board certified in emergency medicine. Ms. Armstrong did not sustain additional permanent injury as the result of the incident at work on February 4, 1993. That conclusion is based upon Dr. Koprivica's letter dated August 12, 1994, that Ms. Armstrong reported to him that the February 1993 incident caused only a temporary increase in symptoms.

(16) Based upon the testimony of vocational rehabilitation consultant James T. Molski, Ms. Armstrong has lost 22 percent of her ability to perform work in the open labor market when considering both the restrictions provided by Drs. Fullen and Koprivica. Dr. Fullen believes Ms. Armstrong should avoid lifting above chest level and reaching out with a load, which would result in a 10 to 12 percent loss of ability to perform work in the open labor market. Dr. Koprivica, on the other hand, believes Ms. Armstrong should limit her occasional lifting to 20 pounds or less, limit her frequent lifting to 10 pounds or less, and avoid activities that require constant lifting. He also believes that Ms. Armstrong should avoid repetitive bending, pushing, pulling, twisting, and lifting and avoid sitting longer than 30 minutes to an hour at a time, which would result in a 30 to 35 percent loss of ability to perform work in the open labor market.

(17) The medical restrictions provided by Dr. Koprivica, which the Appeals Board adopts as appropriate, would prevent Ms. Armstrong from returning to Philips and performing her former job.

(18) Ms. Armstrong has sustained a 30 percent loss of ability to earn a comparable wage. That is the difference between the stipulated average weekly wage of \$569.94 and the \$320 in wages and \$79.50 in benefits Ms. Armstrong now earns each week working for the steel company.

(19) Ms. Armstrong would not have sustained the November 1992 back injury but for her preexisting back condition. That conclusion is based upon the testimony of both Dr. Fullen and Dr. Koprivica after they both considered Ms. Armstrong's history of back problems.

CONCLUSIONS OF LAW

The Award Upon Remand should be modified to award Ms. Armstrong workers compensation benefits for the November 20, 1992 back injury and to deny permanent partial disability benefits for the February 4, 1993 accident.

(1) The Appeals Board finds and concludes that Ms. Armstrong injured her back at work on November 20, 1992, and that as a result of that accident and low back injury she now has a 10 percent whole body functional impairment. The Appeals Board finds it is significant that Ms. Armstrong told the emergency room personnel on November 22, 1992, that she had injured her back at work two days before. The Appeals Board concludes that Ms. Armstrong

sustained a second accident at work on February 4, 1993, but that injury was only temporary in nature.

(2) The Assistant Director found Ms. Armstrong returned to work after her November 1992 and February 1993 back injuries to an unaccommodated job and earned a comparable wage. Applying Watkins v. Food Barn Stores, Inc., 23 Kan. App. 2d 837, 936 P.2d 294 (1997), the Assistant Director limited Ms. Armstrong's disability compensation to her functional impairment rating.

(3) The Appeals Board finds the facts here are distinguishable from Watkins and, therefore, that case is not controlling. In Watkins, the Court found that the employer returned the employee to an unaccommodated job after his accident and, therefore, the employee was not entitled to an award of permanent partial disability benefits greater than the functional impairment rating when he was later laid off.

(4) Here, the Appeals Board finds that Ms. Armstrong returned to a job that was not appropriate as evidenced by her testimony and which was in violation of her ultimate medical restrictions that were later provided by Dr. Koprivica. Watkins must be applied carefully as to avoid punishing motivated employees who attempt to return to work despite injuries and medical restrictions.

(5) Because Philips retained Ms. Armstrong in its employ until March 5, 1993, and presumably paid her a wage comparable to that she was earning when she was injured in November 1992, Ms. Armstrong has a 10 percent permanent partial general disability for the period from the date of accident until March 5, 1993. After that date, Ms. Armstrong has a 26 percent permanent partial general disability when considering the 22 percent loss of ability to perform work in the open labor market and 30 percent of loss of ability to earn a comparable wage as required by K.S.A. 1992 Supp. 44-510e.

(6) The issues of timely notice and written claim were addressed in the Appeals Board's Order dated March 12, 1997. That Order is incorporated by reference. As previously determined, Ms. Armstrong provided Philips with both timely notice and written claim.

(7) Because the February 1993 accident did not cause permanent injury or disability and, therefore, there are no overlapping weeks of permanent partial disability benefits, the credit contained in K.S.A. 44-510a (Ensley) is not applicable.

(8) The Workers Compensation Fund is responsible for the entirety of the award. Due to the multiple occasions that Ms. Armstrong strained her back before the November 1992 accident, the Appeals Board concludes that her back condition was of such character that it constituted a handicap in her obtaining and retaining employment. Her back pain had caused her to miss work at Philips on at least two occasions and had caused her to self-limit her activities before November 1992. As determined above, Philips had knowledge of Ms.

Armstrong's back problems before the November 1992 accident, which would not have occurred but for the preexisting condition. See K.S.A. 1992 Supp. 44-567.

(9) Ms. Armstrong is entitled to an award for the medical expense that she incurred because of the November 1992 and February 1993 accidents.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award Upon Remand dated April 29, 1997, entered by Assistant Director Brad E. Avery, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Renee Armstrong, and against the respondent, North American Philips Lighting, and its insurance carrier, Travelers Insurance Company, and the Workers Compensation Fund for an accidental injury which occurred November 20, 1992, and based upon an average weekly wage of \$569.94 for 15 weeks of permanent partial disability benefits at the rate of \$38 per week or \$570 for a 10% permanent partial general disability for the period from November 20, 1992, through March 5, 1993; followed by 400 weeks of permanent partial disability benefits at the rate of \$98.79 per week or \$39,516 for a 26% permanent partial general disability, making a total award of \$40,086.

As of May 29, 1998, there is due and owing claimant 15 weeks of permanent partial general disability compensation at the rate of \$38 per week in the sum of \$570 and 273 weeks of permanent partial general disability compensation at the rate of \$98.79 per week in the sum of \$26,969.67, for a total of \$27,539.67, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$12,546.33 is to be paid for 127 weeks at the rate of \$98.79 per week until fully paid or further order of the Director.

The Workers Compensation Fund is responsible for the entirety of the award.

Claimant is awarded the medical expense that she incurred because of the November 1992 and February 1993 accidents. Claimant is also entitled to apply to the Director for additional medical care and treatment.

The Appeals Board adopts the remaining orders set forth in the Award Upon Remand to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of June 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert A. Martin, Salina, KS
John W. Mize, Salina, KS
David G. Shriver, McPherson, KS
Brad E. Avery, Assistant Director
Philip S. Harness, Director